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No. 03-761

In the

# Supreme Court of the United States

RANCHO VIEJO, LLC,

*Petitioner,*

v.

GALE A. NORTON, Secretary of the Interior, et al.,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the Commerce Clause confer on Congress, through the Endangered Species Act, the power to prohibit the "taking" of an intrastate, noncommercial species of toad caused by the setting of a fence on Petitioner's land?

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## INTEREST OF AMICI CURIAE[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited, constitutional government. To further those ends, Cato Institute scholars have published numerous works discussing the importance of the constitutional doctrine of enumerated powers in our federal system and, in particular, the proper scope and limits of national power under the Commerce Clause. E.g., Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 Notre Dame L. Rev. 507 (1993); Glenn Harlan Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?* CATO Institute Policy Analysis No. 216, Oct. 10, 1994; Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167 (1996).

Pacific Legal Foundation was established over 30 years ago and is the largest and most experienced nonprofit legal foundation of its kind, litigating matters affecting the public interest at all levels of the federal and state courts. As a staunch advocate of limited government and individual rights, the Foundation has instituted a "federalism project" known as the Center for Constitutional Liberty. The project seeks to arrest more than a half century of national governmental expansion. The Foundation has a long history of amicus participation in this Court and was involved in the landmark Commerce Clause cases on which this case turns: *United States v. Lopez*, 514 U.S. 549 (1995) (*Lopez*), and *United States v. Morrison*, 529 U.S. 598 (2000) (*Morrison*). Among its objectives, the project seeks

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

to have constitutionally-derived limits imposed on federal regulation of wholly intrastate, noncommercial activity, such as the "taking" of the Arroyo toad in this case.

## INTRODUCTION

This Court has never upheld a Commerce Clause regulation of an intrastate activity, based on that activity's substantial effects on interstate commerce, unless that activity was economic in nature. But the D.C. Circuit did so in this case. By looking beyond the statutorily regulated activity to the commercial nature of the underlying project, the D.C. Court of Appeals undermined this Court's Commerce Clause jurisprudence and created a conflict with the Fifth Circuit. This Court should grant the petition for writ of certiorari, therefore, to determine whether the Endangered Species Act (ESA) should be sustained in this case when the regulated intrastate activity—the "taking" of the Arroyo toad—is not itself economic in nature. A faithful reading of *Lopez* and *Morrison* will lead to the conclusion that the Act cannot be sustained as a Commerce Clause regulation of intrastate, noncommercial activities. Moreover, this is the third time this Court has been petitioned to consider the constitutionality of the ESA. It is certain that this Court will continue to be petitioned on this important question of law until it resolves the issue.

## SUMMARY OF THE ARGUMENT

There are two compelling reasons for review of the D.C. Circuit opinion in this case. First, the decision "continues a line of cases in conflict with Supreme Court jurisprudence." And second, the decision is "in conflict with at least one other circuit." *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Sentelle, J., dissenting).

Based on its prior Commerce Clause cases, in *Lopez* this Court erected a simple but solid framework for determining "substantial effects" on interstate commerce and, therefore, the constitutional validity of certain Commerce Clause enactments

like the ESA in this case. As described in *Morrison*, this framework requires a consideration of four (*Lopez*) factors: (1) Does the statute, by its terms, have anything to do with commerce or an economic enterprise; that is, does the act purport to regulate an economic activity? *Morrison*, 529 U.S. at 609-10. (2) Does the statute contain an express "jurisdictional element" which might limit its reach to a discrete set of activities that "'additionally have an explicit connection with or effect on interstate commerce?'" *Id.* at 611-12. (3) Does either the statute or "its legislative history contain express congressional findings regarding the effects upon interstate commerce" of the regulated activity? *Id.* at 612. And, (4) is the connection between the regulated activity and a substantial effect on interstate commerce attenuated? *Id.*

A straightforward application of these "*Lopez* factors" would demonstrate that the ESA, at least as applied to intrastate, noncommercial species, does not substantially affect interstate commerce. However, the lower courts have applied these factors in anything but a straightforward manner. Without exception, the lower courts have misapplied *Lopez* and *Morrison* to avoid invalidating the Act as applied in a particular case. Most commonly, the lower courts nullify the fourth *Lopez* factor by giving credence to arguments that are based on the most attenuated economic effects conceivable, such as a potential future market in the species or that harming any protected species, no matter how isolated, will diminish biodiversity and, thus, substantially affect interstate commerce. *See, e.g., National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (*Home Builders*). Likewise, the lower courts routinely change the parameters of the "substantial effects" test to justify a particular outcome. Such was the case here. The D.C. Circuit changed the first *Lopez* factor. Rather than evaluate whether the "taking" of a toad, the expressly "regulated activity," is economic in nature, the court instead looked beyond the terms of the statute to find any underlying

commercial activity that could, however coincidentally, tie the "taking" to an economic endeavor.

Not only is this approach at odds with this Court's decisions in *Lopez* and *Morrison*, it is also in conflict with another circuit. "The Fifth Circuit has explicitly rejected the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the 'take' was itself economic." *Rancho Viejo* at 1159. Therefore, to bring the D.C. Circuit in line with this Court and to resolve a circuit conflict, this Court should grant the petition for writ of certiorari.

**STATEMENT OF THE CASE**

Petitioner, Rancho Viejo, sought to build a residential development on 52 acres of a 202-acre site in San Diego County. *Rancho Viejo v. Norton*, 323 F.3d. 1062, 1065 (D.C. Cir. 2003). The property is bordered on one side by Keys Creek. *Id.* In furtherance of the development, Rancho Viejo erected a fence parallel to the bank of Keys Creek. *Id.* Because Arroyo toads, an endangered species, were found on the upland side of the fence, the United States Fish and Wildlife Service believed the fence impeded the movement of the toad from its upland habitat to its breeding area in the creek. Therefore, the Service informed Petitioner that the fence "'has resulted in the illegal take and will result in the future illegal take . . .'" of the Arroyo toad in violation of the ESA and must be removed. *Id.*

In response, Rancho Viejo filed a complaint for declaratory and injunctive relief in the D.C. District Court challenging the authority of the federal government to regulate the toad under the commerce power. *Id.* at 1065-66. The toad is not a commercial species. Its range is limited to 1.2 miles from the stream in which it was bred and the toad does not travel outside of the State of California. *Id.* at 1065.

Relying on the Circuit's split-panel decision in *Home Builders*, that predates this Court's decision in *Morrison*, both the district and circuit courts upheld the ESA against the constitutional challenge. The court of appeals held that because the "taking" of the toad has occurred by means of a commercial activity, a residential development project, Congress can regulate that activity under the Commerce Clause—as an activity that "substantially affects" interstate commerce. *Id.* at 1072. This approach effectively converts the commerce power into a general police power like that reserved to the states.

## ARGUMENT

Whatever ambiguity may lie in this Court's landmark cases of *Lopez* and *Morrison*, this Court has been absolutely clear on one point: "[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611.

This Court has struck down putative Commerce Clause enactments that do not purport to regulate economic activity, including a prohibition on the possession of a gun within 1,000 feet of a school (*Lopez*) and a statute authorizing civil damages for gender-motivated crimes (*Morrison*). The basis for this Court's recent rulings is clear: the Commerce Clause power has limits. It is therefore essential that this Court determine the scope of that power in the context of the ESA. That Act, more than any other, challenges the outer limits of Congress' Commerce Clause authority. As applied in this case, the ESA admits of no limits to the federal regulatory power.

## I

## THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE CONTINUES A LINE OF CASES IN THE D.C. CIRCUIT THAT INCREASINGLY UNDERMINES THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

The D.C. Circuit Court of Appeals diverged from this Court's modern Commerce Clause jurisprudence with its split opinion in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041. That case involved the Delhi Sands Flower-loving Fly and, as in this case, the court of appeals had to determine if section 9(a)(1)(B) (16 U.S.C. § 1538(a)(1)(B)), of the ESA, exceeded Congress' Commerce Clause power as applied to an intrastate, noncommercial species. Section 9(a)(1)(B) makes it unlawful to "take" a threatened or endangered species without federal authorization. The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Any violation of this section is subject to both civil and criminal sanctions. *See* 16 U.S.C. § 1540.

At the time the case was brought, there were eleven known populations of the fly, all within an eight-mile radius in San Bernardino and Riverside Counties in California. The dispute arose when the United States Fish and Wildlife Service listed the fly as an endangered species and halted construction of a sorely needed hospital located in fly habitat in San Bernardino County.

The County and others sued the Service arguing, among other things, that the federal government did not have authority to regulate the "taking" of the fly—a wholly intrastate and noneconomic activity. Plaintiffs relied on this Court's landmark case in *Lopez* wherein this Court struck down the

Gun-Free Schools Zone Act as an invalid Commerce Clause enactment. Much like the "taking" of a protected species, the Act prohibited, by its terms, the mere possession of a gun within 1,000 feet of a school. Although guns are bought and sold and move across state lines, this Court held that the Act "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez* at 561. Additionally, this Court found the Act did not contain a jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce" or that would limit the Act's reach "to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 561-62.

This Court flatly rejected the government's argument that the cost of gun-related crime in the aggregate had a substantial impact on the economy and adversely affected education. "[I]f we were to accept the Government's arguments," this Court stated, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564. This Court was simply unwilling to transform Congress' Commerce Clause authority into a general police power like that retained by the states. *Id.* at 567.

But the appellate court in *Home Builders* was not so constrained. Although that case would appear to be a precise fit with *Lopez*, the majority upheld the "take" provision of the ESA as applied to the Delhi Sands Flower-loving Fly. The majority judges in *Home Builders* could not agree on the basis for upholding the "take" provision but held variously that the protection of even noncommercial, intrastate species can be aggregated to show a connection to interstate commerce or that the ESA really regulates habitat, not just species, and that the development of such habitat is obviously connected with interstate commerce. *See Home Builders*, 130 F.3d at 1049-60. One judge even suggested, inexplicably, that the "take"

prohibition amounted to regulation of channels of interstate commerce and so could be regulated under the Commerce Clause. *Id.* at 1046-49.

But that decision was patently inconsistent with this Court's rationale in *Lopez*. Like the possession of guns in *Lopez*, on its face the "taking" of the fly in *Home Builders* had nothing to do with "commerce" or any other economic activity. Indeed, the "taking" of the fly, which was not bought and sold on the open market, had less of a connection to "commerce" than the possession of a gun, an indisputably commercial item.

Additionally, the ESA does not contain a jurisdictional element that would ensure through case-by-case inquiry that the fly, or the "taking" of the fly, would have an explicit connection to or effect on interstate commerce, a lapse fatal to the Gun-Free Schools Zone Act. Nevertheless, the court in *Home Builders* limited *Lopez* to its facts and decided the "taking" provision of the ESA, as applied to the fly, was a proper exercise of Congress' Commerce Clause power.

Following *Home Builders*, the D.C. Circuit faced another Commerce Clause challenge to the ESA in *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001). Although the court had the benefit of this Court's more recent decision in *Morrison*, which strengthened and clarified *Lopez*, the D.C. Circuit continued its divergence from this Court's Commerce Clause jurisprudence.

*Morrison* involved a Commerce Clause challenge to 42 U.S.C. § 13981, the Violence Against Women Act. That statute provided a federal civil remedy for the victims of gender-motivated crimes. This Court adopted *Lopez* as the proper framework for its inquiry and observed that central to the *Lopez* decision was the noneconomic nature of the statute. *Morrison*, 529 U.S. at 610.

To emphasize the point, this Court stated: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613.

Because violent acts on their face (like the "taking" of a species) had nothing to do with economic activity, this Court invalidated the challenged provision of the Violence Against Women Act. Nevertheless, the D.C. Circuit was unwilling to overrule its prior decision in *Home Builders*, but continued its slide away from this Court's jurisprudence when it considered the Commerce Clause challenge to the "take" provision of the ESA in *Building Industry Association.* That case involved ESA regulation of certain species of fairy shrimp; minute crustaceans found in puddles, water holes, and vernal pools in the California Central Valley. Like the flies in *Home Builders*, and the toads in this case, the fairy shrimp were an intrastate, noncommercial species.

The "take" provision of the ESA prohibits all harmful conduct to a listed species, however it may occur, and is not limited by its terms to economic activity. *See* 16 U.S.C. § 1532(19). Nor does the "take" provision have a jurisdictional element that ensures through case-by-case analysis that the ESA only applies to certain "takes" of species with a substantial effect on interstate commerce. *Id.* Therefore, under the *Lopez* framework, as underscored by *Morrison*, the regulation of the fairy shrimp should have been invalidated.

With the current case, however, the D.C. Circuit continues to drift even further from this Court's Commerce Clause decisions. The lower court upheld an order of the United States Fish and Wildlife Service to remove a fence from private property to facilitate the movement of Arroyo toads, a species which is not commercial and does not migrate. Thus, once again, the D.C. Circuit upholds under the commerce power the regulation of "an activity which is neither interstate nor

commerce, . . . ." *Home Builders*, 130 F.3d at 1061 (Sentelle, J., dissenting).

Protecting the toad from a fence erected on private property does not convert the "taking" of the toad into commercial conduct under any *Lopez* factor. As Judge Sentelle observes:

> The point in *Lopez*, as further explained in *Morrison*, is not that Congress can regulate any activity if the act of regulating catches an entity or an action that is itself commercial independent of the noncommercial nature of the regulated entity and activity. It is rather that "'[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'"

*Rancho Viejo*, 334. F.3d at 1159 (Sentelle, J., dissenting to denial of rehearing en banc).

Thus, the D.C. Circuit has it backwards. The noneconomic nature of the prohibited conduct—possession of a gun—was central to this Court's decision to invalidate the Gun-Free School Zones Act in *Lopez*. Likewise, the noneconomic nature of the "take" provision should be central to this Court's decision to invalidate the ESA as applied to the Arryo toad. If the statute does not purport to regulate a commercial activity, the courts may not simply cast about for the nearest commercial activity to bring the statute under the purview of the Commerce Clause, as was done in this case. That would allow Congress to regulate under the Commerce Clause without any "logical stopping point." *See Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting).

The D.C. Circuit did not find that the toad (the regulated entity) is a commercial species or that the "taking" of the toad (the regulated activity) is itself commercial, rather, the court ignored the *Lopez* factors and found that the fence was part of

the development, a clear commercial enterprise, which justified federal regulation under the Commerce Clause. "[The] regulated activity," the court said, "is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens." *Rancho Viejo v. Norton*, 323 F.3d at 1072.

As Judge Sentelle points out, however,

> even if it were constitutionally sufficient that the take, although not required by the terms of the statute, coincidentally constituted activity in interstate commerce, that does not match the facts of this case. Ground preparation and erection of a fence are not commerce, and certainly not interstate. Even the construction of houses hardly constitutes interstate commerce.

*Rancho Viejo*, 334 F.3d at 1159-60 (Sentelle, J., dissenting to denial of rehearing en banc).

This decision caps the D.C. Circuit's continuing failure to properly apply the "substantial effects" test established in *Lopez* and *Morrison* and undermines this Court's Commerce Clause jurisprudence. The decision below "leads to the result that regulating the taking of a hapless toad that . . . lives its entire life in California constitutes regulating '[c]ommerce . . . among the several States.'" *Id.* at 1160 (Roberts, J., dissenting to denial of rehearing en banc). This cannot be the law.

## II

## THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE IS IN CONFLICT WITH A DECISION OF THE FIFTH CIRCUIT

As instructed in *Lopez*, and explained in *Morrison*, the first and primary factor to be weighed in determining an activity's substantial effect on interstate commerce is whether the statute, by its terms, has anything to do with commerce or

an economic enterprise; that is, does the act purport to regulate an economic activity? *Morrison*, 529 U.S. at 609-10. This Court reaffirmed that interpretation of those cases in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*).

In *SWANCC* the government argued that it had authority pursuant to the Commerce Clause to protect isolated, intrastate waters under the Clean Water Act because migratory birds use those waters and "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds" that substantially affect interstate commerce. *Id.* at 173. But this Court was clearly skeptical of that argument noting that it raised "significant constitutional questions." *Id.* "For example," this Court observed, " we would have to evaluate the precise object or activity" that substantially affects interstate commerce. According to this Court, that was unclear because the government had first claimed jurisdiction over petitioner's land "because it contains water areas used as habitat by migratory birds," but now the government was claiming jurisdiction over petitioner's land because it would be used for a landfill which the government argued was "'plainly of a commercial nature.'" *Id.* In response, this Court harkened back to *Lopez* and stated, "But this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' *to which the statute by its terms extends*." *Id.* (emphasis added).

Although this Court did not decide *SWANCC* on constitutional grounds, this discussion is instructive in two respects. First, it further clarifies the first *Lopez* factor. To identify the "precise object or activity" which may substantially affect interstate commerce, this Court said it must look to the terms of the statute. And second, by directing the inquiry to the terms of the statute, this Court impliedly rejected the notion that there are any number of ways to establish substantial effects to validate a Commerce Clause enactment. It is significant, therefore, that the Fifth Circuit expressly rejected the rationale

of the D.C. Circuit in this case upholding the constitutionality of the ESA as applied to the Arroyo toad.

As Judge Roberts pointed out, the decision below "in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so." *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc). This, of course, is contrary to *Lopez*, as explained by *Morrison*, and now *SWANCC*. In this case, the D.C. Circuit upheld the application of the ESA "because Rancho Viejo's commercial development constitutes interstate commerce and the regulation impinges on that development, not because the incidental taking of arroyo toads can be said to be interstate commerce." *Id.*

The problem with this approach is that had it been applied in *Lopez* and *Morrison*, those cases would have come out differently. That is why the approach was expressly rejected by the Fifth Circuit in *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003). Like *Rancho Viejo*, *GDF Realty* involved a Commerce Clause challenge to federal regulation of intrastate, noncommercial species under the ESA. These species of arachnids and mollusks, or so-called "cave bugs," are even more isolated than the Arroyo toads in this case. They live their entire lives in certain caves in the State of Texas and have rarely been seen. But, as in *Rancho Viejo*, the government claimed the nearby development would result in the "taking" of these elusive species and that the connection to that development provided the requisite "substantial effects" on interstate commerce. And, like the D.C. Circuit in this case, the district court in *GDF Realty* adopted that argument. However, the Fifth Circuit did not.

To the contrary, the court of appeals in *GDF Realty* took the district court to task for looking "primarily beyond the regulated conduct—Cave Species takes—in order to assess effect[s] on interstate commerce." *Id.* at 634. According to the

Fifth Circuit, the district court should not have "looked to the plaintiff's planned commercial development of the property where the takes would occur" because, while the effect of regulating "takes" may prohibit development in some circumstances, Congress "is not directly regulating commercial development" through the ESA. *Id.* Thus, the Fifth Circuit concluded:

> To accept [this analysis] would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.
>
> *Id.*

To prove this point, the Fifth Circuit turned to *Lopez* and *Morrison* and observed that regulation of gun possession would have passed muster as applied to a possessor who regularly sold guns while the Violence Against Women Act would have been upheld if the violator had sold videotapes of the violence in interstate markets. But this would have been contrary to those cases, the Fifth Circuit said, because both cases involved a facial attack which requires that there be no circumstances in which the statutes could have been found constitutional. *Id.* at 635.

This is precisely the reason the Fifth Circuit gave for rejecting this approach. As the court explained: "looking primarily beyond the regulated activity in such a manner would 'effectually obliterate' the limiting purpose of the Commerce Clause. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)." *Id.* at 634-35

Judge Sentelle was, therefore, correct in his assessment that a direct conflict exists between the D.C. Circuit and the

Fifth Circuit. Although the Fifth Circuit upheld the ESA in *GDF Realty*, on different grounds, "The Fifth Circuit has explicitly rejected the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the 'take' was itself economic." *Rancho Viejo*, 334 F.3d at 1159 (Sentelle, J., dissenting from denial of rehearing en banc).

## CONCLUSION

This Court has never upheld federal regulation of an intrastate activity, based on that activity's substantial effects on interstate commerce, unless that activity has been economic in nature. To do so would allow Congress unlimited regulatory authority under the Commerce Clause to rival the police powers of the states. But, the D.C. Circuit has given Congress such authority in this case through the ESA. Therefore, to bring that circuit in line with this Court's jurisprudence and to resolve a direct conflict between the D.C. Circuit and the Fifth Circuit, this Court should grant the petition for writ of certiorari and overturn the decision below.

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